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April 13, 2017

Marlene Dortch  
Secretary,  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

RE: Docket 13-236  
Written Ex Parte Presentation

Dear Ms. Dortch:

The Institute for Public Representation submits this analysis on behalf of Prometheus Radio Project and the Media Mobilizing Project<sup>1</sup> to address the impact of the Commission's proposed reinstatement of the UHF Discount.

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<sup>1</sup> Prometheus Radio Project ("Prometheus") is a collective of media broadcast activists committed to promoting diversity, competition, and localism. Prometheus educates its members regarding media policy and technology, and advocates for more just media systems. Prometheus has advocated for rules and policies to promote diversity in media ownership. Members of Prometheus build and assist in the licensing and operation of low power FM radio stations and regularly listen to and view commercial and non-commercial radio and television. Media Mobilizing Project ("MPP") is a Philadelphia-based media rights advocacy group that works on behalf of, and with, poor and working people to build a media, education, and organizing infrastructure that will cohere and amplify the growing movement to end poverty. MPP and the people on whose behalf it works benefit when media are diversely owned. MPP's members regularly listen to and view commercial and non-commercial radio and television.

The analysis demonstrates that

1. The Commission's Draft Order improperly relies on a hypothetical future action which is prohibited by Congress;
2. The transition to digital in 2009 extinguished any reason to keep the UHF Discount; retaining it has allowed some broadcasters to evade the 39% national audience reach cap.
3. Reinstatement of the UHF discount will usher in a new era of media consolidation that will likely leave a few large corporate groups controlling most of the TV stations in the major markets in this country.

**I. The Commission's Draft Order is Arbitrary and Capricious because it Relies on a Hypothetical Future Action which is Prohibited by Congress.**

The Draft Order issued on March 31, 2017 would reinstate the UHF discount while acknowledging that the discount is no longer technologically justifiable, but states it will address the UHF discount "as part of a broader reassessment of the national audience reach cap, which we will begin later this year."<sup>2</sup> This conclusion is arbitrary and capricious, not only because the policy change itself is flawed, but also because the Commission has no authority to change the national audience reach cap.

Commissioner O'Rielly explained that the Commission is prohibited from changing the national reach cap last year when the FCC eliminated the UHF discount.<sup>3</sup> Specifically, he explained that the 2004 Consolidated Appropriations Act ("CAA")<sup>4</sup> ensures the national ownership cap "remains one of the few media ownership rules specifically set by statute and the only one exempted from the Quadrennial Review process governing the other ownership rules, in order to protect a tenuous compromise from the whims of the Commission."<sup>5</sup>

The CAA adopted a 39 percent national ownership cap by amending Section 202(c)(1) of the 1996 Telecommunications Act and excluding that cap from the regular ownership review by the Commission, starting that "This subsection [47 U.S.C. §202(h)] does not apply to any rules relating to the 39 percent national audience reach limitation in subsection (c)(1)(B)."<sup>6</sup> The CAA further prohibited the Commission from using its forbearance authority in Section 10 of the Communications Act, 47 USC §160, with respect to the 39 percent cap.<sup>7</sup>

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<sup>2</sup> Draft Order, ¶ 12.

<sup>3</sup> Report and Order, Docket 13-236, 31 FCCRcd 10213, 10251 (2016) (Dissenting Statement of Commissioner O'Reilly).

<sup>4</sup> Pub. L. No. 108-199, §629(1), (3)

<sup>5</sup> 31 FCCRcd at 10251 (Dissenting Statement of Commissioner O'Reilly).

*Id.*

<sup>6</sup> CAA, §629(3).

<sup>7</sup> CAA, §629(2).

Statutory language makes clear that the Commission does not have authority to “consider[] whether the [national] cap should be modified.” as the Draft Order asserts at ¶10. Thus, the decision to retract an admittedly antiquated and unfounded technical rule to implement that Congressional directive is arbitrary and capricious under the Administrative Procedure Act because it is premised on authority the Commission does not possess. The Draft Order is further arbitrary and capricious because it does not address the question of the Commission’s authority to change the national ownership cap at all. The invalid nature of the Draft Order is compounded because the composition of the current Commission does not support an interpretation that the Commission can change the national audience reach cap as illustrated by Commissioner O’Rielly’s dissent last year.

## **II. Post-digital transition, the UHF Discount permitted widespread evasion of the 39% cap.**

The UHF Discount, used for purposes of calculating national audience reach for the purposes of the FCC’s national ownership cap, was adopted in 1985 to address the disparity that then existed between VHF and UHF stations.

The digital television transition in 2009, however, obviated the technological distinction between VHF (channels 2-13) and UHF (above channel 13).<sup>8</sup> The relocation process itself resulted in a significant drop in the number of VHF stations and a concomitant increase in the number of UHF stations. The FCC’s quarterly-published Public Notices show that, as of September 30, 2008, there were 706 commercial UHF stations and 582 VHF stations. A year later, after the transition, there were 1017 commercial UHF stations and only 377 VHF commercial stations.

Thus, the immediate effect of the transition was that many formerly VHF stations became UHF stations. This alone permitted owners of those stations to reduce their audience reach as calculated using the UHF Discount. In addition, because use of UHF frequencies no longer conferred any significant advantage and, in some cases, was actually advantageous, and because licensees could easily convert many VHF stations to UHF, many did so. The effect of such conversions was to allow them to reduce their national ownership reach as calculated using the UHF discount, thereby giving them opportunity to acquire additional TV stations without exceeding the nominal 39 percent national ownership cap. The impact of this change was very substantial. For example, as of 2008, the New York City market constituted 6.55 percent of the national audience. By converting their New York flagship stations from VHF to UHF, CBS, NBC and Fox thus reduced their national reach by more than 3 percent. This new headroom was then available for the purchase of more stations.

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<sup>8</sup> For a number of reasons, including avoiding viewer confusion and protecting hard-earned good will associated with traditional channel positions, the old channel framework was retained, and receivers and converters were designed to associate those channel numbers with the appropriate digital frequency.

The digital transition made the VHF/UHF distinction irrelevant for any business purpose except calculating compliance with the national TV ownership cap. Immediately after the 2009 transition, *Broadcasting & Cable* announced that, for the first time, its 2010 annual rankings of the “Top 25 Station Groups” would only consider actual audience reach and even stopped publishing FCC-calculated discounted audience reach. It explained that:

For the first time, B&C this year is ranking its top 25 station groups only by total U.S. coverage. B&C's information is heavily based on data provided by SNL Kagan, and backed by B&C's own research and input from the listed companies.

The decision to change our ranking system is in line with industry trends. When last June's digital transition was complete, the majority of U.S. TV stations had moved to UHF channels, which are better suited to broadcasting digital television at lower power levels. In the analog world, the biggest TV stations aired on higher-power, lower-frequency VHF channels.

That change calls into question current TV industry regulations. The law of the land remains that any one group can own only enough TV stations to cover 39.4% of the country, and continues to take the UHF discount into account. However, the transition and related technology have rendered the discount moot, and without the discount two station groups, Ion and Univision, exceed the limit.<sup>9</sup>

Industry analysts have recognized that UHF Discount has become an important loophole and treated UHF status as a benefit in their valuations. No one seriously disputes that the original policy justification for the UHF Discount has long since disappeared. Thus, for example, while editorializing in opposition to repeal of the UHF Discount, *Broadcasting & Cable* acknowledged that broadcasters “us[e] existing rules to try to provide the regulatory relief denied them by the decade of inaction on . . . loosening ownership limits.”<sup>10</sup>

The charts which follow demonstrate the significant benefit that some group owners have realized since 2008 because of the UHF Discount.

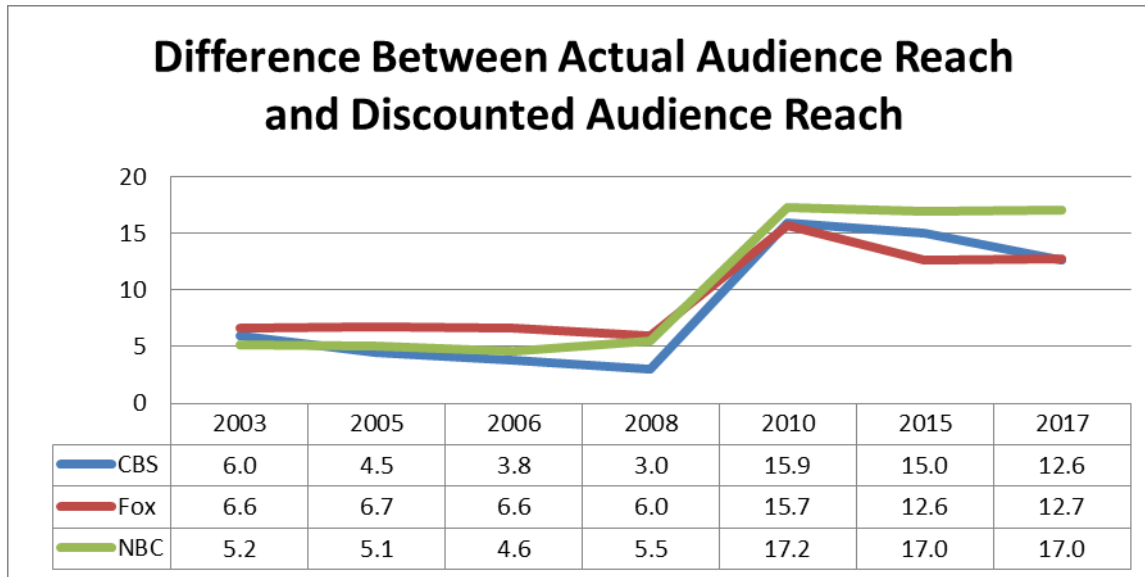
Figure 1 shows the way in which CBS, NBC and Fox took advantage of the UHF Discount to expand their actual audience reach following the digital transition through conversion of VHF stations to UHF. For example, CBS’ owned stations as of 2008 had an actual audience reach of 38.64%, but using the UHF Discount, were considered to have a reach of 35.65%, a difference of about 3.9%. By 2010, through the conversion of VHF stations to UHF, CBS’ actual audience reach remained essentially unchanged at 39.59%, but its discounted calculated audience reach

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<sup>9</sup> Paige Albiniak, *B&C Updates Top 25' Criteria for DTV Era: Sets rankings by total U.S. coverage in light of increased power of UHF stations*, *Broadcasting & Cable*, <http://www.broadcastingcable.com/news/local-tv/bc%E2%80%99s-top-25-station-groups-2010/42271>. Notably, in 2014, after the Commission proposed repeal of the UHF Discount, *Broadcasting & Cable* resumed publication of discounted audience reach.

<sup>10</sup> *Editorial: Rethinking Cap*, *Broadcasting & Cable*, August 12, 2013), <http://www.broadcastingcable.com/news/washington/editorial-rethinking-cap/61737>.

fell to 23.69%. Thus the impact of the UHF Discount jumped from about 3% to about 16%. Figure 1 shows this impact from the UHF Discount for CBS, NBC and Fox and demonstrates the sharp and immediate effect of the digital transition.



**Figure 1**<sup>11</sup>

Figure 2 shows the actual audience reach and audience reach calculated with the UHF Discount for the three companies before and after the digital transition. Thus, even though CBS' actual audience reach was almost the same, its calculated reach dropped from 39.59% to 23.69%.

	CBS		Fox		NBC	
	2008	2010	2008	2010	2008	2010
Actual Audience Reach	38.64	39.59	38.72	38.72	35.86	36.63
Discounted Audience Reach	35.65	23.69	32.74	23.04	30.41	19.39

**Figure 2**

<sup>11</sup> Source: 2003, 2005, 2006, 2008 and 2015 *Broadcasting & Cable* rankings of *Top 25 station groups*. For 2010, IPR queried the FCC's TV Broadcasters database in February 2010 to determine which broadcast stations listed by *Broadcasting & Cable* in 2008. For 2017, see Sherman and Shields, *Bloomberg News*, *infra*, note

Following the digital transition, the UHF Discount has afforded most of the major broadcast groups the benefit of a substantial opportunity to acquire more stations without exceeding the nominal 39% cap. Figure 3 shows the relatively small opportunity for expansion available to CBS, NBC and Fox prior to the digital transition (columns 1 and 2) and the very substantial “headroom” that they had as of 2015, prior to the repeal of the discount (column 3). It also shows that repeal of the discount would restore the status quo ante (column 4), so that their room for expansion would be essentially the same as what it was in 2005.

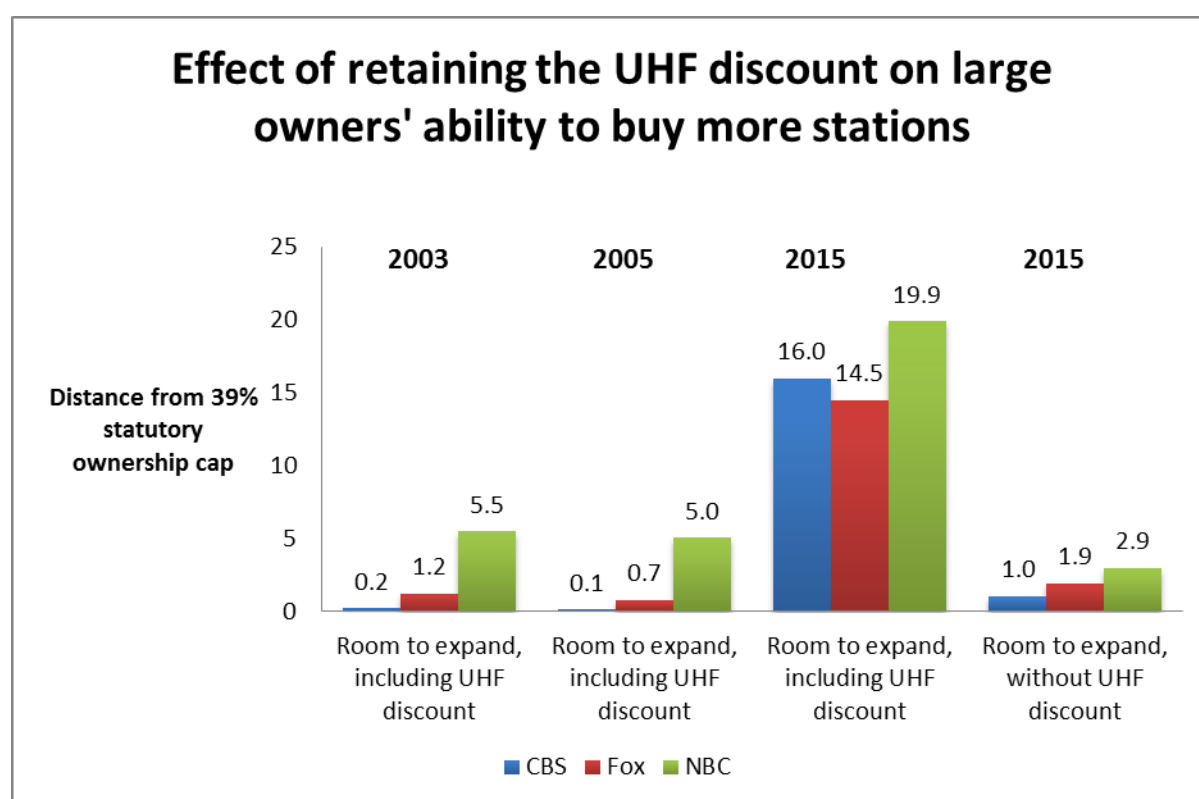
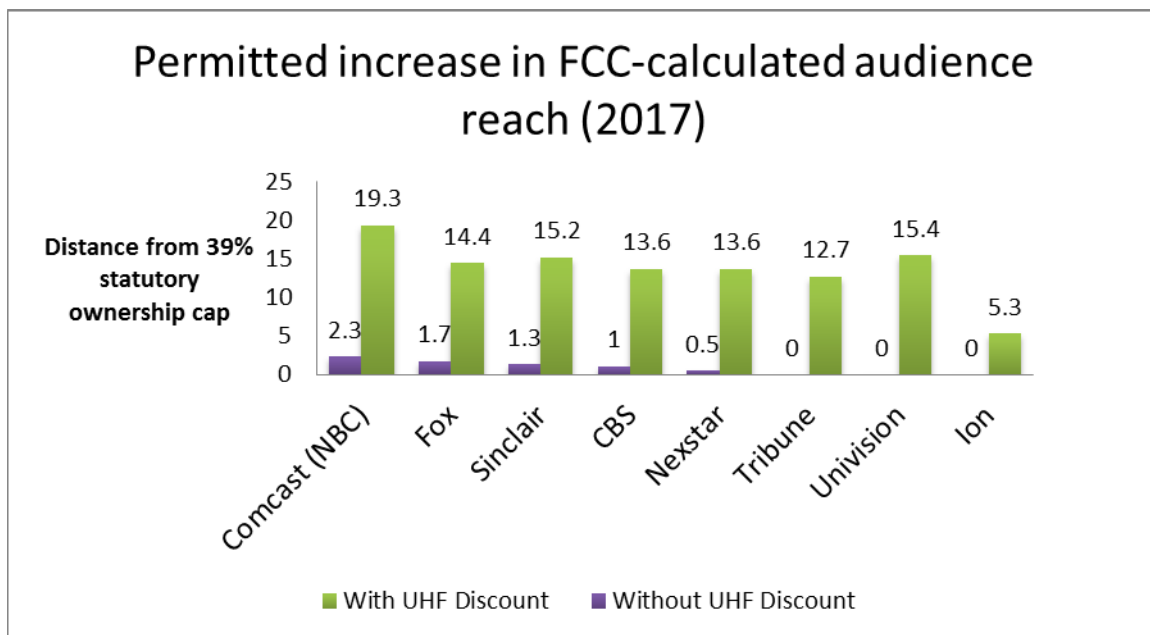


Figure 3<sup>12</sup>

<sup>12</sup> Source: 2003, 2005, and 2015 *Broadcasting & Cable* rankings of *Top 25 station groups*.

The effect of reinstatement of the UHF Discount would extend to other broadcast groups besides the three that are shown in Figure 3. Figure 4 shows how much additional room for acquisitions (“headroom”) each of eight group owners would obtain by restoration of the discount. Thus, after repeal of the UHF Discount, NBC (far left on the chart) can currently acquire stations reaching up to an additional 2.3% of the national audience. Reinstatement of the discount would allow it to instead increase its calculated national audience reach by 19.3%. Similarly, at this time Sinclair can only acquire stations reaching an additional 1.3% of the nation, but reinstatement would allow it to add 15.2%.



**Figure 4**

Figure 5 shows the same data in a different way to dramatize how restoration of the UHF Discount would affect each of the station groups. As in the above example, NBC (on the far left) has an actual audience reach of 36.7%, leaving it only about 2.3% headroom (shown in blue). Restoration of the discount would reduce its calculated reach to 19.7% (shown in red). The difference between the blue and red bars represents the benefit of the UHF Discount.

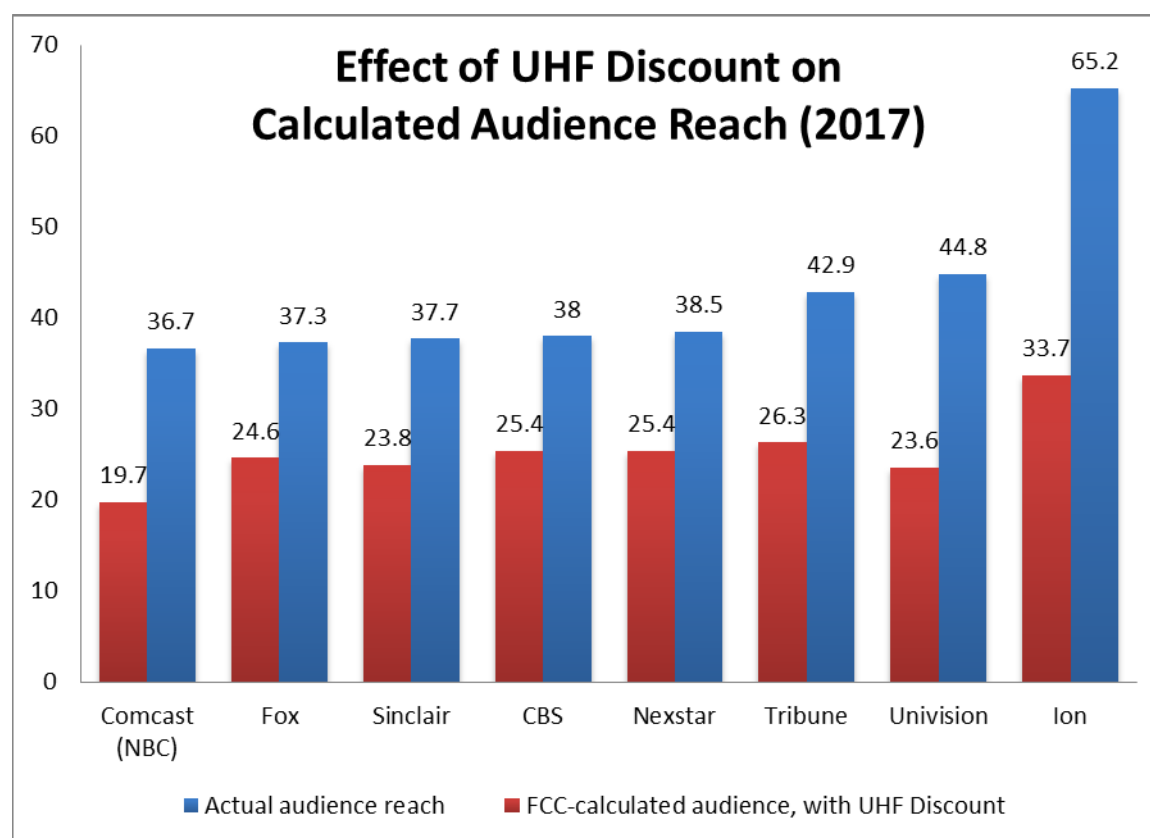


Figure 5

## II. Reinstatement of the UHF discount will lead to massive media concentration.

Ever since the Commission made available the Draft Order reinstating the UHF discount, the press has been filled with stories about how its repeal would fuel a rush of TV station mergers and acquisition. This underscores the dramatic diminution in diversity that will harm the viewing public if the proposed decision is adopted.

The quotations below provide a sample of such articles.



## General

“Federal regulators plan to reverse an Obama-era rule that prevented major television-station owners from buying stations or readily selling themselves, a move that could touch off a wave of deals among media companies.”

D. McKinnon and Joe Flint, *FCC Tees Up Rule Change That Could Spur Wave of TV Industry Mergers*, Wall Street J. Mar. 29, 2017, <https://www.wsj.com/articles/fcc-to-vote-on-relaxing-obama-era-rule-on-tv-ownership-1490825750>

“Federal regulators in the U.S. are considering rolling back a rule passed by Democrats last year that restricts broadcast companies including Sinclair Broadcast Group Inc. and Tribune Media Co. from buying more TV stations.”

Todd Shields, *FCC in Possible Boost to TV Mergers Announces Vote to Ease Rule*, , Bloomberg, Mar. 31, 2017, <https://www.bloomberg.com/politics/articles/2017-03-30/fcc-said-to-move-toward-easing-rule-that-discourages-tv-deals>

“An upcoming FCC rule change could ignite a fresh wave of TV station sales. When the FCC meets April 20, the commission is widely expected to reinstate the so-called “UHF discount,” which would revise how TV station owners’ reach is calculated and open up room for some companies to buy more stations.”

FCC Rule Could Set Off New Era Of TV Mergers, Insider Radio, Apr. 7, 2017, [http://www.insideradio.com/free/fcc-rule-could-set-off-new-era-of-tv-mergers/article\\_4be3242a-1b60-11e7-8817-4fda67a73890.html](http://www.insideradio.com/free/fcc-rule-could-set-off-new-era-of-tv-mergers/article_4be3242a-1b60-11e7-8817-4fda67a73890.html).

Repeal of the UHF discount and the launch of a comprehensive review of the national ownership cap “are expected to spur a new wave of mergers among broadcast station groups.

Many major broadcast group station holdings include UHF stations, and for years they enjoyed a “discount” in the way that the FCC calculated the coverage area of the UHF band. For those stations, they were allowed to count only 50% of the households in their market when calculating whether they complied with the ownership cap.”

Ted Johnson, FCC Chairman Proposes Move to Ease Media Ownership Restrictions, Variety, Mar. 20, 2017, <http://variety.com/2017/biz/news/fcc-ajit-pai-media-ownership-uhf-discount-1202019727/>

Restoring the UHF discount could lead to a wave of deals, said Wilkinson Barker broadcast attorney David Oxenford in a blog post Friday. The draft UHF discount order announced Thursday “will likely have an immediate impact on the market for the purchase and sale of television stations” if approved, Oxenford said. “There is much

appetite for broadcast groups to grow larger to compete with other video providers that have nationwide reach."

### **Impact on specific companies**

"April 03, 2017. Hunt Valley Md.-based Sinclair Broadcast Group Inc. (SBGI) is on the hunt, and Des Moines, Iowa-based Meredith Corp. (MDP) is a likely target for the media conglomerate, according to RBC Capital Markets analysts Leo Kulp and Steven Cahall. Sinclair Broadcasting may have new room to grow after FCC Chairman Ajit Pai on March 30 put a discussion of the so-called UHF discount on the commission's April 20 agenda, the first step toward a vote that could result in its reinstatement. Prior to being eliminated in September 2016 by the FCC, the discount had for the past 30 years allowed the country's largest television station owners to expand their reach without violating a cap on total national audience. A reinstatement would be good news for the expansion hopes of Sinclair and other broadcasters."

The Deal, Apr. 4, 2017, 2017 WLNR 11107596

"Companies could begin announcing deals the day after the FCC's April 20 meeting, [Wells Fargo Analyst Marci] Ryvicker said. Numerous large broadcast entities are expected to seek acquisitions, she said, including Cox, Tegna and Scripps. "Everybody's a buyer," Ryvicker said, though she said Tribune is an exception, and is seen as looking to sell. With the NAB Show the week after the April FCC meeting, more dealmaking than usual could happen there, she said."

*The FCC's planned review of the national TV ownership cap*, Washington Internet Daily, Apr. 4, 2017, 2017 WLNR 10726318.

"The reinstatement of the UHF discount would give many broadcasters room to grow. Sinclair would see its current 38% share drop to 24% with the discount applied. Nexstar Media Group Inc.'s 39% attribution would decline to 26%, and Tegna Inc. would fall from 32% to 27%."

"Speaking on an earnings call last month, Tegna Media President Dave Lougee said changes to the ownership rules would be "a very good and overdue development for Tegna and the industry overall." Nexstar Chief Executive Perry Sook told investors and analysts last month that the company is "already in discussions should the rules change about opportunities that might be available to us."

"CBS, which owns stations with an audience share of 38%, would also be able to become a buyer with the discount reducing its reach to around 25%. CBS CEO Leslie Moonves told analysts earlier this month that the company would welcome deregulation."

"I can tell you in the right circumstance if the cap is lifted we would strategically want to buy some more stations because we think it is important,' Mr. Moonves said."

“A deal that many analysts and industry executives are anticipating is Sinclair acquiring Tribune Media Co. , whose national reach of 44% would fall to 26%. Wells Fargo Securities analyst Marci Ryvicker in a recent report that such a purchase is “complicated but possible.”

“Sinclair-Tribune combination would create a broadcasting behemoth of more than 200 local stations. Sinclair operates 173 TV stations, while Tribune owns or operates 42. Sinclair has a market cap of \$4.1 billion, and Tribune’s market cap is \$3.2 billion.”

“Even with the reduced ownership reach that a UHF discount would bring, the combination would still likely require some stations to be sold off to keep in line with the 39% cap. Tribune exceeds the current 39% cap because its reach grew when the UHF discount was eliminated and the company was granted a waiver.”

D. McKinnon and Joe Flint, *FCC Tees Up Rule Change That Could Spur Wave of TV Industry Mergers*, Wall Street J. Mar. 29, 2017, <https://www.wsj.com/articles/fcc-to-vote-on-relaxing-obama-era-rule-on-tv-ownership-1490825750>

“If the “UHF discount” is restored, it could help station groups like Sinclair Broadcast Group, which has reportedly been interested in acquiring Tribune Media, which has 42 stations. According to Bloomberg News, Sinclair CEO Christopher Ripley last month told investors that he believes that “more consolidation will happen, in fact we think it’s a necessary activity.”

In an FCC filing in January, Sinclair not only urged the agency to restore the UHF discount, but to eliminate the ownership cap entirely. They argue that “television stations face increased national competition from a host of new services, including satellite companies, cable networks, OTT providers, and direct subscription services.”

Ted Johnson, FCC Chairman Proposes Move to Ease Media Ownership Restrictions, Variety, Mar. 20, 2017, <http://variety.com/2017/biz/news/fcc-ajit-pai-media-ownership-uhf-discount-1202019727/>

“We do expect this new FCC to tackle the ownership rules,” Christopher Ripley, Sinclair’s chief executive officer, told investors Feb. 22. “We’re very optimistic about this new FCC and the leadership of Ajit Pai. And in terms of what that could lead to on the consolidation side, we definitely anticipate that more consolidation will happen, in fact we think it’s a necessary activity.”

*Todd Shields*, Possible Tribune Suitor Sinclair Woos FCC’s Pai on Regulations, Bloomberg, March 27, 2017, <https://www.bloomberg.com/politics/articles/2017-03-27/possible-tribune-suitor-sinclair-woos-fcc-s-pai-on-regulations>

## CONCLUSION

The decision proposed in the Draft Order is based on an unlawful premise. It will effectively repeal the 39% national ownership cap and rapidly usher in numerous transactions that will diminish diversity in the mass media and harm the public's First Amendment right to have diverse sources of information.

Respectfully submitted,

/s/ Andrew Jay Schwartzman

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